A

RUGBER KAUR AJAIB SINGH

v.

HO SHEE FUN & ANOR

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SURIYADI HALIM OMAR JCA
ALIZATUL KHAIR OSMAN J
[CIVIL APPEAL NO: C-04-223-2008]

C

21 APRIL 2011

DAMAGES: *Assessment - Loss of future earnings - Whether clearly established - Lack of corroborative documentary evidence - Testimonies of plaintiff's key witnesses - Whether plaintiff's monthly income overtly*

D *disproportionate compared to her level of education and, thus, unreasonable*

The plaintiff/appellant filed a claim in the Sessions Court for injuries suffered as a result of an accident between her and the defendant/respondent. The respondent was found 100% liable and

E general damages (RM155,000), special damages (RM64,675) and loss of future earnings (RM447,975) were awarded to the appellant. The respondent's appeal to the High Court was only successful in respect of the issue of future earnings. The High Court judge touched on the dearth of documentary evidence and

F the appellant's want of qualification (which did not seem to justify her alleged monthly income of RM7,000), and found that the testimonies of the appellant's key witnesses *ie*, PW3, PW6 and PW8, were doubtful and unbelievable. The judge subsequently held that the appellant had clearly failed to establish loss of future

G earnings. Hence, the present appeal by the appellant, restricted to the issue of future earnings.

Held (dismissing the appeal with costs, and affirming the decision of the High Court)

Per Suriyadi Halim Omar JCA delivering the judgment of

H **the court:**

(1) From the evidence, it was obvious that with the exception of PW3 who adduced bank slips to show two payments made into the appellant's personal account, the appellant, PW6 or

I PW8 failed to adduce any documents to support their testimonies. There were no salary slips, SOCSO or EPF

documents tendered in support thereof and the appellant, who was in a high income bracket in 1995, had also failed to submit a copy of the income tax form. PW8, who could have assisted in legitimising the appellant's substantial earnings, lost his neutrality when he admitted during cross-examination that they were actually husband and wife. Letters tendered, supposedly to support the appellant's employee status with her husband's company, had unwittingly raised doubts about their marital status. Without a critical scrutiny of the facts of this case, any judge could arrive at a questionable decision and prejudice the respondent's case. If not for the interference of the High Court judge, that error could have materialised here and led to an injustice against the respondent. The cases raised by the appellant's counsel, which supposedly established the acceptance of certain testimony on income despite the absence of documentary evidence, were not on all fours with the present case and were, hence, irrelevant. In certain circumstances, courts will entertain certain financial claims without corroborative documentary evidence, but subject to reasonable demands and common sense. In this instance, there was no doubt that the appellant's monthly income of RM7,000 was overtly disproportionate compared to her level of education and was certainly not reasonable. *Mahmod bin Kailan v. Goh Seng Choon & Anor* (dist); *Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis* (dist); *Abdul Ghani bin Hamid v. Abdul Nasir bin Abdul Jabbar* (dist). (paras 16-18)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/perayu memfailkan tuntutan dalam Mahkamah Sesyen bagi kecederaan yang ditanggung akibat suatu kemalangan di antara beliau dan defendan/responden. Responden didapati bertanggungjawab 100% dan gantirugi am (RM155,000), gantirugi khas (RM64,675) dan kehilangan pendapatan masa depan (RM447,975) telah diawardkan kepada perayu. Rayuan responden ke Mahkamah Tinggi hanya berjaya berhubungan dengan isu pendapatan masa depan. Hakim Mahkamah Tinggi menyentuh atas ketiadaan keterangan dokumentari dan kekurangan kelayakan perayu (yang nampaknya tidak menjustifikasikan pendapatan bulanannya yang dikatakan sebanyak RM7,000), dan mendapati bahawa testimoni saksi-saksi utama, iaitu, PW3, PW6 dan PW8, mencurigakan dan tidak dapat dipercayai. Hakim kemudiannya

memutuskan bahawa perayu jelasnya telah gagal membuktikan kehilangan pendapatan masa depan. Oleh yang demikian, rayuan semasa oleh perayu, dihadkan kepada isu pendapatan masa depan.

Diputuskan (menolak rayuan dengan kos, dan mengesahkan keputusan Mahkamah Tinggi)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Dari keterangan, ia adalah jelas bahawa kecuali PW3 yang telah mengemukakan slip-slip bank untuk membuktikan dua pembayaran yang dibuat ke dalam akaun peribadi perayu, perayu, PW6 atau PW8 gagal mengemukakan apa-apa dokumen bagi menyokong testimoni mereka. Tiada slip-slip gaji, dokumen-dokumen SOCSO atau EPF yang dikemukakan untuk menyokong dan perayu, yang berada dalam golongan orang berpendapatan tinggi pada 1995, juga telah gagal menyerahkan salinan borang pendapatan cukai. PW8, yang mungkin dapat menolong mengesahkan pendapatan perayu yang substantial, hilang keberkecualiannya bila beliau mengaku semasa pemeriksaan balas bahawa mereka sebenarnya suami isteri. Surat-surat yang dikemukakan, yang dikatakan menyokong status pekerja perayu dengan syarikat suaminya, telah secara tidak sengaja menimbulkan keraguan tentang status perkahwinan mereka. Tanpa penelitian kritikal fakta kes ini, mana-mana hakim akan mencapai keputusan yang boleh dipersoalkan dan memprejudiskan kes responden. Jika bukan kerana campurtangan hakim Mahkamah Tinggi, kesilapan itu boleh terjadi di sini dan menyebabkan ketidakadilan terhadap responden. Kes-kes yang dibangkitkan oleh peguam perayu, yang dikatakan membuktikan penerimaan testimoni tertentu mengenai pendapatan meskipun tiada keterangan dokumentari, tidak dapat dibandingkan dengan kes semasa dan adalah, oleh itu, tidak relevan. Dalam keadaan tertentu, mahkamah akan menerima tuntutan kewangan tertentu tanpa keterangan dokumentari menyokong, tetapi tertakluk kepada tuntutan munasabah dan akal. Dalam kes semasa, tidak ada keraguan bahawa pendapatan bulanan perayu sebanyak RM7,000 adalah terang-terangan tidak seimbang berbanding dengan tahap pendidikannya dan adalah jelasnya tidak munasabah. *Mahmod bin Kailan v. Goh Seng Choon & Anor* (dibezakan); *Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis* (dibezakan); *Abdul Ghani bin Hamid v. Abdul Nasir bin Abdul Jabbar* (dibezakan).

Case(s) referred to:

Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor [1995] 4 CLJ 317 HC ***(dist)***

Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 HC ***(dist)***

Coghlan v. Cumberland [1898] 1 Ch 704 ***(refd)***

Hussaina Rani Naina Mohamed v. Ahmad Nadzri Kamaruddin & Anor [1997] 3 CLJ 500 CA ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Mahmod Kailan v. Goh Seng Choon & Anor [1976] 1 LNS 68 FC ***(dist)***

Rasidin Partorjo v. Frederick Kiai [1976] 1 LNS 123 FC ***(refd)***

Tan Chow Soo v. Ratna Ammal [1967] 1 LNS 178 PC ***(refd)***

Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***

Tara Singh And Others v. PP [1948] 1 LNS 70 HC ***(refd)***

Tengku Mahmood v. PP [1974] 1 LNS 176 HC ***(refd)***

United Plywood And Sawmill Ltd v. Lock Ngan Loi [1970] 1 LNS 164 FC ***(refd)***

Yahaya Mohamad v. Chin Tuan Nam [1975] 1 LNS 195 PC ***(refd)***

For the appellant - Datuk Jagjit Singh; M/s Jagjit Singh & Co
For the respondents - S Anpalagar; M/s Anad & Noraini

[Appeal from High Court, Kuantan; Civil Appeal No: 12-95-2005]

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar JCA:

[1] This appeal before us originated from a claim filed by the plaintiff (hereinafter referred to as the appellant) at the Sessions Court for injuries suffered as a result of a collision between her and the defendant (hereinafter referred to as the respondent). The Sessions Court found the respondent 100% liable for the accident and awarded general damages in the sum of RM155,000, special damages at RM64,675 and loss of future earnings at RM447,975. The respondent filed an appeal at the High Court but was only successful on the future earnings. In a nutshell the High Court disallowed the appeal regarding liability, general damages and special damages but allowed the appeal against future earnings. The appellant being dissatisfied filed a notice of appeal before the Court of Appeal and by choice restricted her appeal only on the issue of future earnings.

[2] It was obvious that the learned judge was fully aware of the principle that an appellate tribunal should be slow to interfere with the finding of fact of a trial judge, in this case the Sessions Court judge, more so as he had the advantage of hearing and observing the demeanour of the witnesses before arriving at his conclusion. This well established principle, which also has common sense written all over it, was clearly at the back of his mind as he had made mention of the case of *Hussaina Rani Naina Mohamed v. Ahmad Nadzri Kamaruddin & Anor* [1997] 3 CLJ 500 in his grounds of judgment (see also *Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 1 LNS 195; *Tan Chow Soo v. Ratna Ammal* [1967] 1 LNS 178).

[3] Despite the inhibition laid down by the above case, the learned judge still set aside the award of future earnings. Why he did that was merely an affirmation that the abovementioned inhibition is not absolute. It is the duty of an appeal court, if satisfied or convinced that the trial judge had acted upon principles of law that were wrong, had misapprehended the facts or had made a wholly erroneous conclusion, to reverse the decision (*Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; *Rasidin bin Partorjo v. Frederick Kiai* [1976] 1 LNS 123). Lindley MR in *Coghlan v. Cumberland* [1898] 1 Ch 704 had occasion to say:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appeal from, but carefully weighing and considering it; and not shirking from overruling it if on a full consideration the court comes to the conclusion that the judgment is wrong.

[4] With the above legal statement foremost in our mind, and in order to decide whether the Sessions Court order ought to be reinstated or otherwise, it was incumbent upon us to peruse the grounds of judgment of the Sessions Court and that of the High Court. A logical step would be for us to also appreciate the respective submissions of the parties, and the evidence adduced in order to arrive at an independent finding. From those perusals we could gauge whether the future earnings award meted down by

the Sessions Court had been considered in some detail by the learned judge ie, whether it was flawed, or should have just been dismissed outright. To his credit the learned judge here, prior to setting aside the future earnings award, had occasion to consider *United Plywood And Sawmill Ltd v. Lock Ngan Loi* [1970] 1 LNS 164, and had correctly stated:

> ... bilamana diputuskan bahawa prinsip yang harus diikuti dalam rayuan terhadap isu gantirugi di peringkat rayuan adalah harus meninjau samada Mahkamah Rendah telah mengawad gantirugi yang terlalu tinggi atau pun terlalu rendah atau pun nyata gagal untuk mengambilkira fakta yang tidak seharusnya diambilkira atau pun telah mengabaikan fakta yang harus diambilkira semasa mengawad gantirugi.

[5] So, let us sift the available evidence, grounds of judgment, the submissions ventilated, and the notes of proceedings to see whether the learned judge was correct in doing what he did. Starting with p. 91 of the records of appeal, the Sessions Court without more had accepted the evidence of the appellant that she was an inspector of pipes and earning a salary of RM6,787.50 at the time of accident. The judge likewise accepted that her salary was paid through her bank account and paid by PW8. Not for a moment was there a critical analysis of the testimony of the witnesses undertaken. The Sessions Court also failed to state why it did not analyze the credibility of the witnesses, the truth of the evidence or for that matter why that stance was taken.

[6] As opposed to the above unacceptable approach, the learned judge of the High Court carried out a totally different exercise. At p. 31 of the records of appeal he rejected the loss of future earnings order as the testimony of the witnesses were "mencurigakan dan amat sukar dipercayai (doubtful and unbelievable)" and thereafter supplied the reasons. Without the critical analytical exercise, which meant that the learned judge had no idea whether the decision of the subordinate court had turned on the demeanour of the witnesses or not, of which the latter court would have had the upper hand had it done so, the learned judge thus only had the cold prints of the notes of proceedings to refer to.

[7] It must be reiterated that for PW8 and the appellant no relevant documentary evidence were adduced to support or corroborate whatever were asserted by them. Without the assistance of such evidence, thus dependent only on oral evidence, very much now depended on their credibility. To determine their credibility, and without any documents to cross-check or test their truthfulness as witnesses, the Sessions Court thus would be left only with their demeanour. As it were in this appeal there was total failure even to do that. It is trite that if a court fails to test their demeanour against the totality of the available evidence, as reflected in the grounds of judgment here, that failure must amount to a misdirection hence entitling an appeal court to reopen the matter. In *Tengku Mahmood v. Public Prosecutor* [1974] 1 LNS 176 Raja Azlan Shah FJ (as His Highness then was) when discussing *Tara Singh And Others v. Public Prosecutor* [1948] 1 LNS 70 remarked:

> … In that case it was held that impression as to demeanour of a witness must be critically tested against the totality of the evidence … Failure to do so does amount, in my view to a misdirection, and if it can be demonstrated that the trial judge had failed to do that, his conclusion as to credibility, cannot in justice, be regarded as impeachable, much less unimpeachable … The whole matter can be considered afresh.

[8] The learned judge touched on the dearth of corroborative documentary evidence, questioned the want of qualification of the appellant, high-lighted the non-tendering of Employment Provident Fund documents and the like. In some detail the learned judge made mention of PW8's role and interest in the case. Due to the doubts created as to the purpose of the money, whether it was for her monthly salary or some other payment (or 'ration' to use his words), what was clear was that the appellant failed to establish that loss of future earnings. We found no error in his approach and conclusion.

[9] We now carry out our independent assessment of the evidence before deciding whether the learned judge had sufficient judicial appreciation of the evidence when overturning the Sessions Court's finding (*Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19). Due to the nature of the case, the appellant had rested much of her case on witnesses' testimony hence forcing us to test their testimony against any available contemporary documents, and other relevant criteria, eg, motive of the witnesses, their interest in the case and the like.

[10] Apart from her own testimony, the appellant relied very much on three witnesses, *viz*. PW3, PW6 and PW8. PW3's evidence went towards establishing the fact that the appellant had an account in Maybank and had received money from Dr. Philip David Hart (PW8). This witness evinced that on 21 March 1995 a sum of RM5,072 was deposited into her account, followed by another sum of RM4,960 on 7 April 1995. He testified that these payments were her salaries.

[11] Despite the simplicity of PW3's evidence, we realized that the attention given to only certain deposits registered in her account, which did not stop on 21 March 1995 despite her alleged retrenchment a few days after the accident (see pp. 158-163 of the record of appeal) required our further critical probing. The question that crossed our minds was: why were there further deposits eg, RM4,900 on 3 May 1995, RM4,932 on 18 May 1995 and RM7,099 on 23 May 1995 when she was already unemployed? Poring through the evidence, these unexplained payments after 21 March 1995 were somewhat explained by PW8 at p. 71 of the records of appeal. His reply on being asked about a cheque being deposited on 4 March 1996 into the appellant's account, was the want of a personal bank account in Malaysia. This answer led to a further query in the like of if in 1996 he had no bank account surely he would not have a bank account since 1992. If that scenario was not unlikely then there was every likelihood that the deposits of 21 March 1995 and 7 April 1995 were actually meant for PW8. The amount of payments could fit quite well with the salary or income of PW8 as a consultant.

[12] After considering the totality of this part of the evidence, we found that not only did these two figures not tally with her supposed RM7,000 salary, but deposited at odd moments, never fixed, having incongruous figures, supposedly sourced from her husband's company, and which in all probability could be his income as a consultant. In a word we were not convinced that the two payments were her monthly salaries deposited into her account.

[13] PW6, the General Manager of FE operations at Bredero Price (M) Sdn Bhd, merely testified that he saw the appellant "as an inspector of one of the projects for Shell" but denied she was his employee. This witness was of no help to anyone.

[14] PW8 was the only meaningful witness to the appellant as he was about the only witness who confirmed that she was an employee of the company owned by him ie, Industry Service Organisation as at 12 May 1995 and was paid USD100 (RM300) per day. He testified that she worked as a pipeline quality inspector then. During the cross-examination he admitted being already married to the appellant on May 1995 though he had been in Malaysia since 1992. Again despite this apparent innocuous testimony certain pieces of information cropped up which did not sound right and affected his credibility. It was in evidence in a contract (RR 165) that on 21 February 1994 the appellant's address was used as a temporary address for the appellant, and that as early as March 1994 the appellant's account had been utilised by him (RR 149-156). As established by the above incontrovertible facts, and despite the alleged marriage of PW8 with the appellant being solemnized only on 18 December 1994, they could not deny that they were already in some relationship prior to that marriage. To confuse matters further we found that PW8 kept reverting to his UK correspondence address when hiring and terminating her services when they were expected to live together in Kuantan as husband and wife. Why the husband-cum-employer hurriedly and unkindly dismissed her was at best left unexplained. If her lack of qualification was not a bar to a well-paid job before, to now retrench her when she could easily be rewarded with another well-paid and cushy job, merely made us wary of PW8's credibility. A letter dated 12 March 1998 received by PW8, and rejecting the appellant's application for a job in his company, raised our eyebrows again as it had the Northumberland's address in the United Kingdom and not Kuantan (RR148). He addressed himself as Dr. Philip D Hart Ph. D, Director to her, rather than by some other endearment name. The contents certainly did no good to the appellant's contention that they were married or helped to establish them as reliable witnesses. To exacerbate matters the letter coldly read, amongst others: "Should your physical situation dramatically improve please do not hesitate to contact me again in the future. Wishing you every success in your future." With him now being an interested party, or at least having an interest in the outcome of the case, whether married or not to the appellant, we found it necessary to have a second hard look at his credibility and evidence. We came out unimpressed with his credibility and accordingly rejected his evidence.

[15] By her own admission the appellant had testified that she only possessed an LCE qualification (Lower Certificate of Education (1963). It was not challenged that prior to 1995 she was a secretary at a company called Silverdale Marine Industries at Kuantan, a job that was commensurate with her educational background. It was after this period that there was a quantum leap in her station in life. Yet for some unknown reason (unless that was her actual station), when she filed the police report about the accident incident she recorded the employment column as "secretary", despite allegedly having worked with Industry Service Organisation for about 2 months as an inspector of pipes. Being offered a job at a late age of 44 by the husband and knowingly having to do "a lot of walking on uneven surface" (Report of Dr. Mohd Nasiruddin of Kuantan Medical Centre Sdn Bhd at RR 130), when taking care of the matrimonial home should have been uppermost in her mind, was strange at best. Recruiting a younger and better educated person would have been much cheaper, more productive and entrepreneurially correct for PW8's company. How her secretarial salary leapt to such a phenomenal amount (or for that matter overnight becoming an "inspector of pipes") was never unravelled either. PW8 could not have been misled by her want of qualification as she was his secretary at Silverdale Marine Industries in 1991.

[16] To summarize the evidence and having perused them it was obvious that with the exception of PW3 who adduced bank slips to show the two payments made into her personal account, the appellant, PW6 or PW8 failed to adduce any document to support their testimony. There were no salary slips, SOCSO or EPF documents tendered in support thereof. Being in a high income bracket in 1995, and invariably attracting income tax, failure to submit a copy of the income tax form caused some uneasiness to us. PW8, who could have assisted in legitimizing her substantial earnings, lost his neutrality when he admitted in the course of the cross-examination that they were actually husband and wife. Letters that were tendered, supposedly to support her employee status with her husband's company unwittingly had put a question mark on their marital status. What was left before us was an assertion in a vacuum, which would read thus:

A the appellant, who only has an L.C.E (1969) qualification, was formerly the secretary to her alleged husband in a company where both were employed in 1991. On the day of the accident (though admitting being a secretary in a police report), was earning a phenomenal sum of RM7000.00 per month as an inspector of pipes. Her employer on the day of the accident was a company owned by her alleged British husband.

[17] Reading the above set of facts without the added frills, and unless a critical scrutiny was undertaken, any judge could arrive at a questionable decision and prejudice the respondent's case. If not for the interference of the learned judge, that error could have materialized here, leading to an injustice against the respondent.

[18] Mention must be made of the submission of learned counsel for the appellant, who apart from ventilating the selective facts that supported the appellant's case, had also alluded to a few cases in support, amongst them being *Mahmod bin Kailan v. Goh Seng Choon & Anor* [1976] 1 LNS 68, *Balakrishnan Kunjamboo Nair v. Savastine Anthony s/o Francis* [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 and *Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor* [1995] 4 CLJ 317. Their supposed relevancy went towards establishing the acceptance of certain testimony on income despite the absence of documentary evidence. With respect, after going through them, we concluded that they were not on all fours with the case before us and hence irrelevant. In *Mahmod bin Kailan v. Goh Seng Choon (supra)* Suffian L.P when increasing the loss of past and future earnings did it on the premise that, in the absence of evidence it would be reasonable to assume that the appellant did earn some money. In the current case the earnings per month for an L.C.E holder was just so unreasonable and mind-boggling. In *Balakrishnan s/o Kunjamboo Nair v. Savastine Anthony s/o Francis (supra)*, despite the absence of documentary evidence the court took judicial notice of the average earnings of a grinding contract worker to be in the region of RM700 per month. Again that sum was logical and reasonable. In *Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar (supra)* despite the absence of KWSP, SOCSO or PERKESO documentations the learned judge accepted the oral testimony of the plaintiff "without hesitation". How could the learned judge not accept the plaintiff's assertion that his income as a driver was RM700 per month and another RM500 as a general worker? Not only were the sums reasonable but supported by three witnesses, *viz*. one Ridzuan (his employer and not an

interested party), Rosli (a friend), and his wife who methodically gave the court a breakdown of her husband's income and monthly expenses. We do concede that in certain circumstances, courts will entertain certain financial claims despite the absence of corroborative documentary evidence, but subject to reasonable demands and commonsense. Without doubt here the appellant's monthly income of RM7,000 was overtly disproportionate compared to her level of education and a far cry from being reasonable.

[19] Based on the above reasons we had no hesitation in rejecting this appeal with costs. We affirmed the decision of the High Court and ordered the deposit be channelled to the respondent as part of the fixed costs.